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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 652

AARON TROSCH, IVAN E. TROSCH AND MELVIN B. TROSCH D B A MARYLAND NEWS COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. ------

AARON TROSCH, IVAN E. TROSCH AND MELVIN R. TROSCH D B A MARYLAND NEWS COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on August 19, 1963.

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on August 19, 1963, and is reprinted herein as an Appendix.

Jurisdiction

The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1254(1).

Questions Presented

1. Did Petitioner interfere with, restrain or coerce its employees in the exercise of the rights guaranteed to them by Section 7 of the National Labor Relations Act?

2. Did Petitioner dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it?

Statutes Involved

The Statutes involved are Section 8(a)(1) and Section 8(a)(2) of the National Labor Relations Act. 61 Stat. 140, 29 U.S.C., Section 158(a)(1) and (2).

Statement of the Case

This case involves a petition of the National Labor Relations Board for enforcement of its order against Petitioner. The Board's decision and order were issued August 23, 1962.

Petitioner is engaged in the wholesale distribution of magazines, books, periodicals, and newspapers in Baltimore, Maryland, and employs approximately 60 employees. On January 6, 1961, Local No. 590, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, filed with the Regional Office of the National Labor Relations Board at Baltimore, Maryland, a Petition for Certification of Representatives asking to represent a unit of Petitioner's employees, 30 in number. On January 18, 1961, a pre-trial conference on the appropriate unit was held. The Union accepted the Company's proposal that the unit should consist of an overall number of employees. On January 30, 1961, Local No. 590 withdrew the petition and on February 1, 1961, filed a second

petition seeking a unit of 32 employees, different from the unit first requested. A hearing was held on this petition on February 27, 1961, and Petitioner denied the appropriateness of the unit sought by Local No. 590. The charge resulting in the order of enforcement was filed by Local No. 590 on October 26, 1961, and was amended on December 15, 1961. The complaint in question was issued on December 15, 1961. As of the date of the filing of the within Petition for Writ of Certiorari, resolution of the question of the appropriate unit of Petitioner's employees for the purpose of collective bargaining is still pending before the Board.

Beginning on February 28, 1961, and continuing until March 3, 1961, Local No. 590 picketed the Company's premises. No employee of the Company respected the picket line. In February 1961, the Company was presented with a petition signed by 53 of its 60 employees stating, "We, the undersigned, including those who have signed Union cards and those who have not signed Union cards, hereby withdraw our membership (from Local No. 590) and demand that the picket line at Maryland News Company be removed." While the picketing was in progress, Appel, an employee of the Company, together with other employees on separate occasions, went to Local No. 590's office and requested return of their Union cards without success. The Company was first approached by the Employees' Association about a contract covering all employees on May 1, 1961. The approach was on the basis that the Employees' Association represented all employees who worked for the Company except the office employees. Because of these representations and the presentation of the petition rejecting Local No. 590 as the bargaining representative, the Company negotiated and entered into a contract covering all of its employees during the first week of June 1961.

Fifty-three of the Company's employees signed the contract. The reason the Company and the Association entered into this agreement was that the employees stated that they were tired of waiting for a ruling from Washington, D. C., concerning Local No. 590 and the Company was anxious to avoid any interruption to its business, which operates 365 days a year. The Company's position is that it had no choice in this matter except to do exactly what it did; that is, enter into an agreement with its employees covering all aspects of their working conditions. When the Company was approached by the Employees' Association, it was presented with conclusive evidence that 53 of its 60 employees had rejected Local No. 590 as their bargaining representative. It was also presented with conclusive evidence that the employees, as a whole, were demanding that something be done concerning their working conditions. The Company had no choice but to accede to the wishes of its employees.

Reasons for Allowance of the Writ

The decision of the United States Court of Appeals and of the Board is based entirely upon the holding of this Court in *Garment Workers v. N.L.R.B.*, 366 U.S. 731 (1961). In the *Garment Workers'* case, the facts were that in October 1956 the Union initiated an organizational campaign at the company's manufacturing plant in San Antonio, Texas. A strike occurred which this Court held was not related to the Union campaign. During the strike, some of the striking employees had signed authorization cards solicited by the Union during its drive; and while the strike was in progress, the Union entered into negotiations with the employer. On August 30, 1957, a memorandum of understanding was signed and on October 10, 1957, a formal collective bargaining agreement was signed. The basic

reasoning for this Court's decision in the *Garment Workers* case appears to be as follows:

> "In their selection of a bargaining representative, Section 9 (a) of the Wagner Act guarantees employees freedom of choice and majority rule. J. I. Case Company v. N.L.R.B., 321 U.S. 332, 339. In short, as we said in Brooks v. N.L.R.B., 348 U.S. 96, 103, the Act placed a non-consenting minority under the bargaining responsibility of an agency selected by a majority of the workers. Here, however, the reverse has been shown to be the case. Bernard-Altman granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the non-consenting majority."

The facts in the instant case are basically and substantially different. In this case, a Union (Local No. 590) filed petitions with the National Labor Relations Board alleging that it represented a majority of 30 or 32 of the Company's 60 employees. This Union clearly never represented more than a very small minority of the Company's employees. Actually, the situation here is that by using the technical processes of the Board this Union has attempted to force its will on a majority of the Company employees, in spite of its clear minority status. The simple fact is that if the Petitioner had not acceded to the wishes of the Employees' Association the employees in question would have been deprived of the benefits incorporated in the eventual contract for many months because of the slow processes of the National Labor Relations Board. For doing what was obviously necessary, on a practical basis, for its employees, the Company has been subjected to a completely unrealistic Order of the Board.

The following is what would have occurred if the theory of the Board's decision had been followed by Petitioner:

1. Because of the pendency of the petition filed by Local No. 590, seeking to represent 30 or 32 of its 60 employees, which Union represented, at an absolute maximum, 7 of 60 employees, Petitioner would have refused to negotiate a contract with the Employees' Association, in spite of its good-faith belief that this Association represented a majority of its employees.

2. Because of the pendency of the Local No. 590 petition, Petitioner would have refused to grant any consideration to improving the wage rates and working conditions of its employees. Under the present law, following the Board's theory, any action by Petitioner granting any such improvement would have constituted an unfair labor practice.

3. Irrespective of any character of proof of the Employees' Association's right to represent a majority of its employees, Petitioner would have refused to take any action at all on the demands of the Association until the Board finally made its decision on the petition of Local No. 590. If the Board's final decision on this petition was favorable on the question of the completely unrealistic unit sought by this Union, Petitioner would have had to await the result of the election of whether a majority of 30 or 32 of its 60 employees wished to be represented by Local No. 590. If the election result was favorable to Local No. 590, Petitioner would have had to negotiate a contract covering 30 or 32 of its employees, leaving the balance of its 60 employees without representation of any kind.

4. If Petitioner had performed the above acts, it would have been clearly in violation of its statutory duty not to interfere with, restrain or coerce its employees in the exercise of their rights guaranteed by the National Labor Relations Act.

The distinguishing basic fact between this case and the *Garment Workers* case is that in this case the delay caused by the use of the Board's processes by a clearly minority Union could have precipitated a situation clearly detrimental to both the Company and its employees if the Company had not done exactly what it did do. We have the situation of a publishing company which, because of the requirements of its business, is forced to continue the said business on an uninterrupted seven-day-a-week basis or else suffer the loss of the business. The only notice of the claim of Local No. 590 as to the representation of its employees which the Company had was the filing of two petitions with the Board, both of which sought entirely unrealistic bargaining units. We have the situation of picketing by Local No. 590 between February 28 and March 3, 1961, while these petitions were pending before the Board. We have the situation of the employees of the Company completely ignoring these pickets. We have the situation of the employees making every attempt to withdraw any possible evidence of representation they may have given to Local No. 590. We have a situation, recognized as dangerous to both the Company and its employees, precipitated by Local No. 590's activities and with every attempt by the employees to resolve the situation by ignoring the Union. We have the situation of more than two months of complete uncertainty as to the status of the entire matter. Under these circumstances, the company and its employees attempted to resolve an intolerable situation by doing everything within their power to resolve the same.

The United States Court of Appeals for the Fourth Circuit recognized the practical difficulties of the instant case in the following language:

> "Even though, under the circumstances here revealed, we are in sympathy with the efforts of Maryland News and its employees to settle outstanding questions between them by negotiating, drafting, and executing a labor agreement and although nothing in the record indicates Company domination of the Association, we cannot say that the Board was not warranted in concluding that the evidence failed to prove that the Association represented a majority of the employees covered by the agreement."

It is submitted that a review of the decision of the United States Court of Appeals for the Fourth Circuit is absolutely necessary under the circumstances in this case in order to insure the proper application in the future of the provisions of the National Labor Relations Act.

Conclusion

For the foregoing reasons, Petitioner urges this Court to grant the Writ of Certiorari.

Respectfully submitted,

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Attorney for Petitioner.

Of Counsel:
FRIEDMAN & GOODMAN.

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(Filed March 11, 1963)

No. 8894

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

Aaron Trosch, Ivan E. Trosch and Melvin R. Trosch, d. b/a Maryland News Company,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(Argued June 12, 1963. Decided August 19, 1963.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BOREMAN, Circuit Judges.

Arthur M. Goldberg, Attorney, National Labor Relations Board, (Stuart Rothman, General Counsel; Dominick L. Manoli, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel, and Allison W. Brown, Jr., Attorney, National Labor Relations Board, on brief) for Petitioner, and James J. Doherty (Friedman and Goodman on brief) for Respondent.

BOREMAN, Circuit Judge:

The National Labor Relations Board, pursuant to section 10(e) of the National Labor Relations Act, as amended

(herein called the Act),[1] seeks enforcement of its order against Aaron Trosch, Ivan L. Trosch and Melvin R. Trosch, doing business as Maryland News Company (hereinafter referred to jointly as Maryland News). The charge of unfair labor practices was originally filed on October 26, 1961, by Warehouse, Retail and Mail Order Employees Local Union No. 590 (herein referred to as Local 590), affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and the complaint was issued December 15, 1961. A hearing was held before a Trial Examiner who, in findings, conclusions and recommendations which were adopted by the Board,[2] held that Maryland News interfered with employees' rights in violation of section 8(a)(1), (2) and (3) of the Act.[3]

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[1] 29 U.S.C.A. §§ 151, *et seq.*, 61 Stat. 136 (1947), 73 Stat. 541 (1959). Section 10(e) is 29 U.S.C.A. § 160(e), 61 Stat. 147 (1947), 72 Stat. 945 (1958).

[2] The Board's Decision and Order, issued August 23, 1962, are reported at 138 N.L.R.B. No. 28.

[3] 29 U.S.C.A. § 158(a) (1), (2) and (3) in pertinent part read as follows:

"§ 158. Unfair labor practices.

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this section as an unfair labor practice) to require, as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made. * * *." 61 Stat. 140 (1947), 65 Stat. 601 (1951), 73 Stat. 525 (1959).

Maryland News, a partnership with its office, warehouse and place of business in Baltimore, Maryland, is engaged in the wholesale distribution of magazines, books, periodicals and newspapers in commerce within the meaning of section 2(6) of the Act.[4] Both Local 590 and the Maryland News Employees Association, later herein to be mentioned, are labor organizations within the meaning of section 2(5) of the Act[5] and no jurisdictional issue is presenfed. The sole question before this court is whether there is substantial evidence in the record as a whole to support the Board's findings. We think the Board's order must be enforced.

On January 6, 1961, Local 590 filed with the Board a petition asking to represent a unit of 30 Maryland News employees. At a hearing on that petition, Maryland News contended that the appropriate unit should include 60 of its employees. Local 590 withdrew its first petition on January 30, 1961, and on February 1, 1961, filed a second petition seeking a unit of 32 employees, different from the unit first requested. At a hearing on the second petition February 27, 1961, Maryland News again denied the appropriateness of the unit sought by Local 590 and claimed it was impossible to carve out a unit of 30 or 32 from the over-all group of 60 employees. The question of the appropriate unit for purposes of collective bargaining was still unresolved and pending before the Board on the date of the Trial Examiner's hearing in the unfair labor practice proceedings here under review. The delay was occasioned by application of Board policy whereby proceedings on a Petition for Certification of Representatives are suspended during the pendency of unfair labor practice charges.

Beginning February 28, 1961, and continuing until March 3, 1961, Local 590 picketed the premises of Maryland News. There was testimony that no Maryland News employee respected the picket line. During the picketing, Philip Appel, an employee of Maryland News, prepared and circulated among the employees a document reading "We the under-

[4] 29 U.S.C.A. § 152(6), 61 Stat. 138 (1947).
[5] 29 U.S.C.A. § 152(5), 61 Stat. 138 (1947).

signed, including those who have signed Union Cards and those who have not signed Union Cards, hereby withdraw our Membership and demand that the picket line at Maryland News Company be removed." Approximately 53 employees signed this document and, shortly thereafter, Appel gave a copy thereof to Melvin R. Trosch (herein referred to as Trosch), one of the partners and then general manager of Maryland News. Trosch testified that he received a copy of the document in February 1961. Appel testified that he also gave copies to representatives of Local 590. While picketing was still in progress, Appel, together with other employees, went to Local 590's office and requested return of their Union Cards. On one such visit Appel was accompanied by James A. Ostendorf, an attorney. Local 590 at all times refused to return the cards.

Appel talked to some fellow employees about organizing an independent group to represent the employees. On or about May 15, 1961, a group of employees, deciding they were tired of waiting for a ruling on the petition of Local 590, met after working hours with attorney Ostendorf and, by majority vote, formed the Maryland News Employees Association (hereinafter referred to as Association) and elected T. M. Wallace chairman. Wallace estimated that eighteen were present at the meeting and Appel said there were thirty. At the request of Wallace, Ostendorf drafted a proposed contract embodying the demands of the employees. Toward the end of May a committee of five, including Wallace and Appel, presented this draft to Trosch and discussed its terms with him. The comittee and Trosch held several other meetings and, finally, at a meeting on June 5 or 6, 1961, Trosch presented them with a draft of a contract prepared by him. The Association committee assured Trosch verbally that it represented a majority of the employees and referred him to the employees' petition signed during the picketing at the end of February. Although the committee had no written authorization from the employees to act as their representative for purposes of collective bargaining, Trosch presumed the Association represented a majority, recognized it as exclusive collective bargaining representative, and bargained with the commit-

tee without demanding further proof of authorization by the employees. At Trosch's request, the draft contract was circulated among the employees for their approval and was signed by fifty-three of them. Trosch signed the contract for Maryland News, but no one remembered whether his signature was placed on the contract before or after its circulation among the employees. The contract, by its terms effective June 7, 1961, provided that the Association would be the exclusive bargaining agent for all employees in the unit of sixty originally proposed by Maryland News, recognized the pendency of Board proceedings, and required all employees to become and remain members of the Association after thirty days' employment, but there was no provision for thirty days' grace for those employees who had not joined the Association on the effective date of the contract.[6]

In determining that Maryland News had committed § 8(a)(2) and § 8(a)(1) violations by recognizing the Association, bargaining and entering into an exclusive collective bargaining agreement with it, the Board, through its Trial Examiner, credited Wallace's testimony over that of Appel in finding that only eighteen employees had attended the organizational meeting of the Association on

[6] The relevant portions of the contract read as follows:

"1. The Union [the Association] shall be the exclusive bargaining agent for all the employees covered by this Agreement. It is the intent of the parties hereto that the within Agreement shall be intended to cover all conditions of employment, between the Company [Maryland News] and the Union [the Association].

* * * * * * *

"7. Employees covered—All employees of the Company except * * * [certain named individuals, positions previously held by named employees, and casual employees not on the regular payroll].

* * * * * * *

"11. Because of the pendency of the National Labor Relations Board proceedings instituted by the Warehouse Union [Local 500], the Company recognizes that certain inequities in wage rates exist as of the date of this Contract. * * *

* * * * * * *

"18. After 30 days employment, all employees covered by this Contract shall become members of the Union [the Association] and remain members in good standing during the period this Agreement remains in effect."

May 15, 1961. The Examiner and the Board ruled that the petition signed by the employees during the February picketing, two months prior to the formation of the Association, had no probative value with respect to the Association's claim of representation. The testimony as to whether other employees joined with the group of eighteen was found to be too vague to permit drawing an inference that the Association did obtain authorization to represent a majority of the employees. It was determined that the signing of the final contract by a majority of Maryland News employees was not relevant under circumstances where it had never been shown that a majority of the employees covered by the agreement had authorized the Association to bargain for them.

Even though, under the circumstances here revealed, we are in sympathy with the efforts of Maryland News and its employees to settle outstanding questions between them by negotiating, drafting and executing a labor agreement, and although nothing in the record indicates company domination of the Association, we cannot say that the Board was not warranted in concluding that the evidence failed to prove that the Association represented a majority of the employees covered by the agreement. The Board, in the exercise of its functions as finder of fact, resolved the conflicts in the testimony and determined the inferences to be drawn from the evidence. We find no error in its decision on these points. Under the standard of review established by *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474 (1951), we are of the opinion that there is substantial evidence in the record as a whole to support the Board's finding that at the time Maryland News recognized, bargained with, and entered into an exclusive collective bargaining agreement with, the Association, the Association was not the representative of a majority of the employees covered by that agreement. Therefore, the case clearly falls under the holding in *Garment Workers v. Labor Board*, 366 U.S. 731 (1961).

In *Garment Workers* a union and an employer had entered into a memorandum agreement by which the em-

ployer recognized the union as the exclusive bargaining representative of certain of his employees at a time when only a minority of the employees in the unit supported the union. Six weeks later, when the memorandum matured into a formal collective bargaining agreement, the union in fact represented a majority of the employees. The Court held that this later-acquired majority representation was not of controlling significance; that the earlier recognition of the minority union was an accomplished fact upon the signing of the memorandum and had deprived the majority of their right to choose their own representative; that the agreement was void in its entirety and was unenforceable even as to consenting employees; that the employer's recognition of the union constituted unlawful support of it, in violation of § 8(a)(2) and § 8(a)(1); and that the prohibited conduct was not excused by any showing of good faith. Consequently, the Board's order to discontinue the unfair labor practices and to conduct an election was held to provide an appropriate remedy.

Here, under the Board's findings, Maryland News recognized a minority union and negotiated a labor agreement with it. The facts that the employer's actions were taken in good faith and that a majority of the employees later signed the final version of the agreement do not help Maryland News. In *Garment Workers v. Labor Board*, 366 U.S. at 739, the Court, in holding that good faith was no defense, said this:

> "* * * We find nothing in the statutory language prescribing *scienter* as an element of the unfair labor practices here involved. The act made unlawful by § 8(a)(2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith."

The Court then discussed the employer's duty to take reasonable steps to verify the representation claims of a union with which it proposes to negotiate a collective bargaining agreement:

> "* * * If an employer takes reasonable steps to verify union claims, * * * he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or authorization cards. Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so." 366 U.S. at 739-40.

The evidence is uncontradicted that Maryland News made no effort to verify the Association's claims of majority support prior to entering into negotiations and drafting a contract. There would seem to be no question that merely by recognizing a minority union and negotiating a labor agreement with it, Maryland News violated § 8(a)(2) and § 8(a)(1).

The Board found that Local 590 had never withdrawn its second petition or abandoned its claims of representation and that Maryland News was aware of the pendency of questions before the Board as to the appropriate unit and the representation of its employees. Applying its *Midwest Piping* doctrine,[7] the Board based its determination that Maryland News was in violation of § 8(a)(2) and § 8(a)(1) upon the finding that Maryland News recognized, bargained with and entered into an exclusive bargaining agreement with the Association while a real question of representation was pending. Under the *Midwest Piping* rule, an employer faced with rival representation claims must maintain a strictly neutral position and cannot aid one of the competing unions by recognizing it. See *N.L.R.B. v. Signal Oil & Gas Co.*, 303 F. 2d 785 (5th Cir. 1962). An exception in which the employer is obliged to recognize and bargain with one of the unions has been carved out where a real question of representation no longer exists because the employer, without illegal act or pressure,

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[7] This doctrine derives from Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945).

obtains indisputable proof of majority support for one of the competing unions. Such proof has been provided by employee petitions (*National Labor Rel. Bd. v. Indianapolis Newspapers*, 210 F. 2d 501 (7th Cir. 1954)) and a card check by a disinterested arbitrator (*District 50, United Mine Workers v. National Labor Rel. Bd.*, 234 F. 2d 565 (4th Cir. 1956)) with the employer verifying the support of a majority of the employees involved by cross-checking the current employment records. Under the Board's findings the proof required to show majority support for the Association was lacking and this case cannot be brought within the exception to the *Midwest Piping* rule.

Under the *Garment Workers* case and the *Midwest Piping* rule, the injury to the employees is the same—abridgment of their right under section 7 of the Act[*] "to bargain collectively through representatives of their own choosing" or "to refrain from" such activity. Such a grant of exclusive recognition to a minority union without verification of its claims of representation constitutes unlawful support in violation of § 8(a)(2) and § 8(a)(1) because a union so favored has "a marked advantage over any other in securing the adherence of employees." *Labor Board v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 (1938). Thus, the Board properly rejected proof of later-acquired majority status on the part of the Association. As was noted in *Garment Workers*, "such acquisition of majority status itself might indicate that the recognition secured by the * * * [earlier] agreement afforded * * * [the minority union] a deceptive cloak of authority with which to persuasively

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[*] 29 U.S.C.A. § 157 provides as follows:

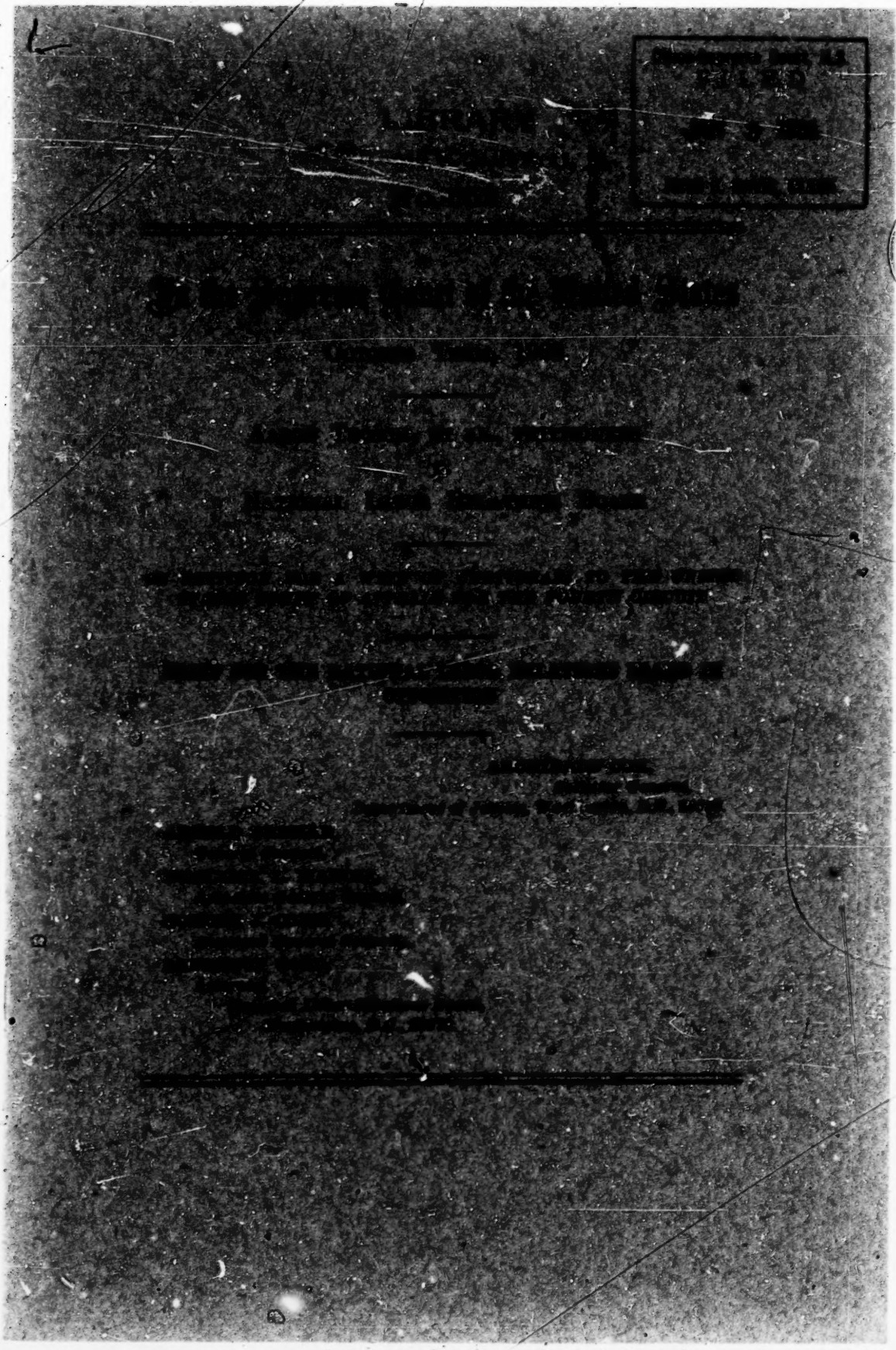
"§ 157. Right of employees as to organization, collective bargaining, etc.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." 61 Stat. 140 (1947).

elicit additional employee support." 366 U.S. at 736. We, therefore, conclude that the Board is entitled to enforcement of its order requiring Maryland News to withdraw recognition from the Association and cease giving effect to its agreement with the Association unless and until the Association shall have been certified by the Board as the representative of an appropriate unit of the employees, and only then if the agreement otherwise conforms to the provisions of the Act.

The union security clause, paragraph 18 of the contract (footnote 6, supra), was found by the Board to be invalid on its face due to its failure to provide the 30-day grace period for "the then employees" required by section 8(a)(3) (footnote 3, supra). In addition, the Board held that execution and maintenance of the contract containing the clause violated section 8(a)(1), (2) and (3) of the Act because it required membership in a minority union as a condition of employment. We agree with these holdings and any future contract should fully conform to the provisions of the Act.

Enforcement granted.



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717-041—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 652

AARON TROSCH, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–10a) is reported at 321 F. 2d 692. The Board's decision and order (J.A. 1–14)[1] are reported at 138 NLRB 215.

JURISDICTION

The decision of the court of appeals was entered on August 19, 1963. On November 16, 1963, 1963, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including

[1] "J.A." refers to the Joint Appendix in the court of appeals which has been filed with the Clerk.

December 1, 1963, and the petition was filed on November 30, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board's finding—that the company violated Sections 8(a) (1), (2), and (3) of the National Labor Relations Act by recognizing and bargaining with the Association as the exclusive representative of its employees at a time when the Association had not been so designated by a majority of the employees—is supported by substantial evidence.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 11–12.

STATEMENT

a. The Board's findings of fact.—The Maryland News Company is engaged in the wholesale distribution of magazines, books, periodicals, and newspapers in Baltimore, Maryland. On January 6, 1961, Local 590[2] filed a petition with the Board's Regional Office seeking certification as the representative of 30 of the Company's employees (J.A. 3; 95–96). At a hearing held on that petition, the company contended that the appropriate unit should include a total of 60 employees (J.A. 3; 29–31). On January 30, Local 590

[2] Warehouse, Retail and Mail Order Employees Local Union No. 590, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

withdrew its petition, but thereafter, on February 1, filed a second petition, seeking a unit consisting of 32 employees (J.A. 3; 21, 30, 92–93). A hearing was held on this petition on February 27, and again the Company denied the appropriateness of the unit sought by Local 590 (J.A. 3; 23, 31, 94).[3]

From February 28 to March 3, 1961, Local 590 picketed the Company premises (J.A. 3; 31–32, 66). During the period of the picketing, Philip Appel, an employee of the Company, prepared and circulated among the employees a document reading "We the undersigned, including those who have signed Union Cards and those who have not signed Union Cards, hereby withdraw our Membership and demand that the picket line at Maryland News Company be removed" (J.A. 3–4; 65–66, 102). This document was signed by approximately 50 of the employees (J.A. 4; 33). Thereafter, Appel gave a copy of the document to Melvin Trosch, the Company's executive director (J.A. 4; 27). While the picketing was in progress, Appel and certain other employees went to Local 590's office on several occasions and requested the return of their union cards (J.A. 4; 68–72). Local 590 refused to return the cards (*ibid.*).

About May 15, 1961, approximately 2½ months after the picketing ended, a meeting attended by 18

[3] The filing of the instant unfair labor practice case caused further proceedings on the representation petition to be suspended. See *National Labor Relations Board* v. *Trimfit of California*, 211 F. 2d 206, 209, note 2 (C.A. 9), and the cases cited therein. Thus, no determination has yet been made as to what would constitute an appropriate unit for the Company's employees.

of the Company's employees was held after working hours in a back room on the Company's premises.[4] Those at the meeting, by majority vote, formed the Maryland News Employees Association, and elected officers (J.A. 4; 43–49, 72). Employee Toussaint M. Wallace was elected chairman of the Association (J.A. 4; 73). Ostendorf, an attorney, counted the votes (J.A. 47, 51, 73) and later prepared bylaws for the Association (J.A. 59–60, 73).

During May, Melvin Trosch was approached by Appel and Ostendorf on separate occasions on behalf of the Association (J.A. 33–34). Ostendorf stated that he was the attorney for the Association and asked Trosch to recognize and sign a contract with the Association. Toward the end of May, Ostendorf turned over to Wallace, the Association chairman, a contract he had prepared for the Association (J.A. 4; 53). Wallace and a committee of four other employees presented the proposed agreeement to Trosch (*ibid.*). Trosch rejected the contract. The committee held several more meetings with him, however, and finally at a meeting on June 5 or 6 Trosch presented the committee with a contract he had prepared (J.A. 4; 53–54). The committee at that time assured Trosch that it represented a majority of the employees, but Trosch did not request any proof of these claims (J.A. 5; 27–28). As Wallace testified, "We had no actual proof, if you're talking about written authorization as representa-

[4] The Trial Examiner credited the testimony of employee Wallace, who was elected Chairman, that 18 employees attended the meeting of May 15, rather than Appel's testimony that 30 were present (J.A. 6).

tion. We didn't have—we just told him in general that we represented the group. That's all. It was all verbal" (J.A. 61). The contract offered by Trosch, which contained a provision requiring the employees to become members of the Association, was accepted by the members of the bargaining committee and signed by them (J.A. 88). Subsequently, at Trosch's request, the contract was circulated among the employees and signed by 53 of them (J.A. 4; 63, 101).[5]

b. The Board's conclusion and order.—The Board, in agreement with the Trial Examiner, found that the Company violated Section 8(a) (1) and (2) of the Act by recognizing, and contracting with, the Association as the exclusive bargaining representative of its employees at a time when the Association did not represent a majority of the employees covered by the contract, and when a real question concerning representation and the appropriateness of the bargaining unit was under investigation in a pending Board proceeding. The Board also concluded that the Company violated Section 8(a) (3) and (1) of the Act by agreeing to, and maintaining, a contract provision which required membership in the unlawfully assisted Association as a condition of employment. Finally, the Board concluded that the aforesaid union-security clause was invalid under Section 8(a) (1), (2), and (3) in that it did not provide for a

[5] The negotiations between the Company and the spokesmen for the Association appear at all times to have been based on a unit of 60 employees—the unit which the Company throughout had urged was the appropriate one for purposes of collective bargaining (J.A. 5: 35).

30-day statutory grace period for "the then employees" (J.A. 8, 11).*

The Board ordered the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with the statutory rights of its employees. Affirmatively, the Board directed the Company to withdraw and withhold recognition from the Association as collective bargaining representative of any unit of its employees and to cease giving effect to the bargaining contract with it, unless and until the Association was certified by the Board as the representative of the employees. The Company was further ordered to post appropriate notices (J.A. 1, 11–14).

c. The decision of the court of appeals.—The court of appeals held that substantial evidence supported the Board's finding that the Company recognized and bargained with the Association when it had not been designated by a majority of the employees as their bargaining representative, and that therefore, under *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 366 U.S. 731, the Company's action violated the Act. The court also found that under the *Midwest Piping and Supply Co.* doctrine (63 NLRB 1060), the Company violated the Act because it recognized and thereby favored one of two competing unions at a time when a real question concerning representation was pending before the Board. Finally, the court held that the Company violated the Act by

* The Company apparently does not contest in this Court the finding that the union security clause was invalid on its face (see Pet. 2, 4).

entering a contract which failed to provide a 30-day grace period for present employees to join the Association and which compelled membership in a minority union as a condition of employment. The court thus enforced the Board's order in full (Pet. 1a–10a).

ARGUMENT

1. This Court held in *International Ladies' Garment Workers' Union v. National Labor Relations Board*, 366 U.S. 731, 736, that an employer violates the Act when it accords exclusive recognition to a union that has not been designated by a majority of the employees as their bargaining representative. Petitioners contend that the Company recognized and bargained with the Association after being presented with "conclusive evidence" that it represented a majority of the employees (Pet. 4, 5). This is contrary to the finding made by the Board and sustained by the court of appeals that the Company recognized the Association at a time when it was not clear that it represented a majority of the employees (J.A. 5–7; Pet. 6a). The resolution of an evidentiary issue of this type does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the record shows that, though the Association claimed to represent a unit of 60 employees, its largest meeting attracted only 18 employees, not all of whom voted in favor of forming a union (J.A. 5–6; 43–49, 61). The Board found that the "testimony as to whether other employees joined with the group of 18 is too vague to permit drawing an inference that the Association did obtain authoriza-

tion from a sufficient number of employees to warrant the committee's assertion of majority representation" (J.A. 6). Moreover, Wallace, the chairman of the Association, conceded that he had no written authorizations from the employees to support the Association's recognition claim (J.A. 61). The petition signed by the employees disclaiming any interest in Local 590 (J.A. 5; 27–28) evidences their disenchantment with that union but does not prove their desire to be represented by the Association. The fact that most of the employees signed the contract establishing a union shop with the Association (J.A. 4; 63, 101) was not relevant since the Company had previously recognized the Association by negotiating and agreeing to a contract with it. This Court made clear in *International Ladies' Garment Workers' Union, supra,* 366 U.S. at 736, that, if an initial grant of recognition is unlawful, it is immaterial that the union later represented a majority of the employees. Thus, in the circumstances of this case, the Board was warranted in concluding that it was not established that the Association represented a majority of the employees at the time exclusive recognition was first accorded to it.

2. Petitioners contend (Pet. 5–7) that its recognition of the Association was justified because, if they had not acted as they did, Local 590's petition with the Board would have forestalled adequate representation for the Company's employees for a long period of time. It is true that the *Midwest Piping* doctrine (*supra*, p. 6) would have prevented the Company from recognizing

the Association even if it appeared to represent a majority of the Company's employees, as long as a real question of representation, raised by Local 590's petition was still before the Board. A real question exists where, consistent with the Board's procedure (29 CFR 101.18), the petitioning union shows that the petition is filed on behalf of 30 percent of the employees in the appropriate unit, even though the union is later found not to represent a majority of the employees. Petitioners' implicit attack on the *Midwest Piping* doctrine—that it requires an employer to delay recognizing another union which in fact represents a majority of employees—is not actually raised by this case. As we have seen, the Company did not have any sound basis for believing the Association represented a majority of employees at the time the Company recognized it. There can be no excuse for foisting on employees a union which a majority of them have not selected.[7]

Moreover, even if the Association had appeared to represent a majority of the employees, the dilemma which petitioners assert under the *Midwest Piping* doctrine could have been largely avoided. Had the Company not prematurely accorded recognition to the Association, there would have been no unfair labor practice to block the representation proceeding and the Board

[7] The Fourth Circuit's view, which is stated in the decision below (Pet. 8a–9a), is that, notwithstanding the pendency of a petition, a real question of representation does not exist if the employer has conclusive proof that a union represents a majority of employees. This disagreement between the Board and the Fourth Circuit is not involved here since, as the Fourth Circuit found, the Company did not have proof that the Association represented a majority of employees.

could have promptly determined whether to direct an election in the unit sought by Local 590 or to dismiss the petition. Had the Board directed an election and had Local 590 lost, or if the Board had dismissed Local 590's petition, the Company would then have been free to recognize the Association, if that union were able to establish, as it failed to do here, that it in fact represented a majority of the employees in an appropriate unit.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for certiorari should be denied.

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JANUARY 1964.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
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> * * * * *
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> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
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> * * * * *
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit ap-

propriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment * * *.

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